IN THE HIGH COURT OF GUJARAT AT AHMEDABAD

CRIMINAL REVISION APPLICATION No 466 of 1997

For Approval and Signature:

Hon'ble MR.JUSTICE H.H.MEHTA

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1. Whether Reporters of Local Papers may be allowed to see the judgements? : YES

2. To be referred to the Reporter or not? : NO

3. Whether Their Lordships wish to see the fair copy of the judgement? : NO

4. Whether this case involves a substantial question of law as to the interpretation of the Constitution of India, 1950 of any Order made thereunder? : NO

5. Whether it is to be circulated to the concerned Magistrate/Magistrates,Judge/Judges,Tribunal/Tribunals? : NO

HABIBBHAI VAZIRBHAI MOMIN CHAUDHARY

Versus

STATE OF GUJARAT

Appearance:

1. Criminal Revision Application No. 466 of 1997

MR PK JANI for Petitioner Nos. 1-2

MR ND GOHIL, APP for Opponent No. 1- State

MR KH BAXI for Opponent No. 2

CORAM : MR.JUSTICE H.H.MEHTA

Date of decision: 15/01/2003

C.A.V. JUDGEMENT

1. The original accused of C.R.No.I-43/96 of Kakoshi Police Station [District Patan] has, by filing this present Criminal Revision Application under Section 397

read with Section 401 of Criminal Procedure Code, 1973 [for short the "Cr.P.C."] challenged the correctness, legality, propriety and regularity of judgment Ex.4 dated 05.09.1997 rendered by the learned Additional Sessions Judge, Mehsana, Camp at Patan [for short the "learned Judge of the Revisional Court] in Criminal Revision Application No.68 of 1997, by which order dated 24.04.1997 passed by the learned Judicial Magistrate [F.C.], Sidhpur [for short the "learned Magistrate of the trial Court"] below a final report under Section 173 of Cr.P.C. filed by the Senior Police Sub-Inspector, Kakoshi Police Station [District Patan] in connection with C.R.No.I-43/96 indirectly came to be set aside and the subject matter of Criminal Revision Application No.68 of 1997 before the learned Judge of the Revisional Court was remanded to the learned Magistrate of the trial Court with necessary directions.

2. The facts leading to this present Criminal Revision Application in a nutshell are as follows :

2.1 The present revision opponent No.2 Palaji Hiraji Devda, Taluka Development Officer, Sidhpur lodged a police complaint against the present criminal revision petitioners in Kakoshi Police Station at 10.15 A.M. on 26.06.1996 alleging that the present criminal revision petitioners had committed the offences punishable under Sections 408, 477, 420 and 114 of the Indian Penal Code, 1860 [for short the "I.P.C."]. That complaint came to be registered as C.R.No.I-43/96 in Kakoshi Police Station [District Patan]. Shri K. R. Ninama, Police Sub-Inspector of Kakoshi Police Station [District Patan] started to conduct the police investigation in the case. He collected certain documentary evidence from the witnesses and recorded the statements of the witnesses, who were conversant with the facts of the case. At the end of the police investigation, instead of filing a charge-sheet against the present criminal revision petitioners, Shri K. R. Ninama submitted his report dated 14.09.1996 through S.D.P.O., Sidhpur to the learned Magistrate of the trial Court, on 20.09.1996. Thereupon, the learned Magistrate of the trial Court passed an order to issue the notice against the complainant to show cause as to why the "B" summary be not granted as prayed for by police in that report. By that report Shri K. R. Ninama submitted to the learned Magistrate of the trial Court that no offence appears to have been committed by two accused against whom the said complaint was lodged in Kakoshi Police Station and, therefore, the "B" summary be granted in the case. Pursuant to order, dated 20.09.1996 of the learned Magistrate of the trial Court, the show

cause notice was issued against the complainant. The complainant appeared through his advocate and filed his written reply Ex.4, dated 21.12.1996 wherein he requested the learned Magistrate of the trial Court to refuse to grant "B" summary and by taking cognizance of the offences to issue warrants against two accused. Thereafter, the learned Magistrate of the trial Court, after taking into consideration the material on record and after hearing the arguments of the learned advocates for both the parties, passed an order dated 24.04.1997, below the report filed by Shri K.R. Ninama, Police Sub-Inspector of Kakoshi Police Station and by that order, he allowed the said report of police and granted "B" summary, as prayed for by the police.

3. Being aggrieved against and dissatisfied with the said order dated 24.04.1997 of the learned Magistrate of the trial Court, the original complainant filed Criminal Revision Application No.68 of 1997 under Section 397 read with Section 399 of Cr.P.C. in the Court of the learned Judge of the Revisional Court. At this stage, it is necessary to mention that the original complainant did not join the original accused in the said Criminal Revision Application No.68 of 1997. By filing that Criminal Revision Application No.68 of 1997, the original complainant has challenged the correctness, legality, propriety and regularity of the order dated 24.04.1997 of the learned Magistrate of the trial Court passed below the report of Shri K. R. Ninama, Police Sub-Inspector of Kakoshi Police Station. The learned Judge of the Revisional Court, after taking into consideration the material on record and after hearing the arguments of the learned advocates for both the parties, by rendering his judgment Ex.4 dated 05.09.1997 in the said Criminal Revision Application No.68 of 1997, allowed that Criminal Revision Application No.68 of 1997 and directed the learned Magistrate of the trial Court to treat the objections filed by the present complainant at Ex.4 as the complaint and to take further action in the matter, as per the procedure contained in Sections 200 to 204 of Cr.P.C.

4. Being aggrieved against and dissatisfied with the said judgment Ex.4 dated 05.09.1997 of the learned Judge of the Revisional Court rendered in Criminal Revision Application No.68 of 1997, the original accused have preferred this present Criminal Revision Application.

5. I have heard Mr.J.S.Unwala, learned advocate for and on behalf of Mr.P.K.Jani, learned advocate for the criminal revision petitioners, Mr.N.D.Gohil, learned APP

for the revision opponent No.1 - State of Gujarat and Mr.K.H.Baxi, learned advocate for the revision opponent No.2 i.e. original complainant. Mr.J.S.Unwala, learned advocate for the criminal revision petitioners has taken me through the impugned order passed by the learned Magistrate of the trial Court in the final report and the impugned judgment Ex.4 rendered by the learned Judge of the Revisional Court in Criminal Revision Application No.68 of 1997, which is challenged in this present Criminal Revision Application.

6. Mr.J.S.Unwala, learned advocate for the criminal revision petitioners has argued that on the report filed by Shri K. R. Ninama, Police Sub-Inspector of Kakoshi Police Station, the learned Magistrate of the trial Court passed an order granting "B" summary as prayed for by the Investigating Officer. He has argued that in the report, the Investigating Officer has observed that at the end of the investigation, it was found that no offence appears to have been committed by either of the accused and, therefore, the "B" summary be granted. Mr.Unwala has further argued that looking to this order, a right was accrued in favour of the present accused to the effect that they are "not-guilty" for the offences for which the complaint was lodged against them and further that the complaint lodged by the complainant was found to be a false complaint qua the accused. He has further argued that the said order was passed by the Competent Court having jurisdiction to pass such an order. He has further argued that on being aggrieved against and dissatisfied with the said order, the original complainant filed a Criminal Revision Application under Sections 397-399 of Cr.P.C. in the Court of learned Judge of the Revisional Court and that Criminal Revision Application came to be registered as Criminal Revision Application No.68 of 1997. He has further argued that if we read Ex.1 i.e. memo of application of Criminal Revision Application No.68 of 1997, we find that the original complainant was the applicant, while the State Government was the only opponent. He has argued that the learned Judge of the Revisional Court, without hearing the present criminal revision petitioners i.e. original accused in whose favour a right has been accrued to the effect that they were innocent and complaint was false, indirectly set aside the order dated 24.04.1997 passed by the Learned Magistrate of the trial Court. He has further argued that though the present criminal revision petitioners i.e. original accused were necessary parties before the learned Judge of the Revisional Court, they have not been joined in Criminal Revision Application No.68 of 1997 as opponents parties. They are denied a

valuable right of being heard by the learned Judge of the Revisional Court and, therefore, the judgment Ex.4 rendered by the learned Judge of the Revisional Court on 05.09.1997 in Criminal Revision Application No.68 of 1997, is ex-facie illegal and it requires to be set aside. He has further argued that the subject matter of this present Criminal Revision Application be remanded to the learned Judge of the Revisional Court with necessary directions to give a right of audience to the accused and then pass a judicial order strictly in accordance with law. He has further argued that in view of his submissions, the present Criminal Revision Application be allowed and the impugned judgment Ex.4 dated 05.09.1997 of the learned Judge of the Revisional Court be quashed and set aside. In support of his arguments, Mr.J.S.Unwala has placed reliance on the following two authorities :

[1] State Bank of India v. Rajendra Kumar Singh and others, reported in AIR 1969 Supreme Court 401.

[2] Mayaben Arjunsinh Vasadia v. Arjunsinh Dhirajsinh Vasadia & Ors., reported in 1996 (3), 37 (3) GLR 35.

7. Mr.N. D. Gohil, learned APP for the revision opponent No.1 i.e. State of Gujarat has supported the arguments of Mr.Unwala. He has submitted that the accused were necessary parties before the Court of the learned Judge of the Revisional Court and, therefore, the impugned judgment Ex.4 be set aside and subject matter, of this present Criminal Revision Application be remanded to the learned Judge of the Revisional Court with necessary directions.

8. Mr.K.H.Baxi, learned advocate representing the revision opponent No.2 i.e. original complainant has resisted this present Criminal Revision Application on the ground that the accused were not at all necessary parties to be heard by the learned Judge of the Revisional Court because whatever order was passed by the learned Magistrate of the trial Court, was ex-facie illegal. In view of the principle laid down in the decision of PATEL HATHIBHAI DWARKADAS v. PATEL KHODABHAI HARGOVANDAS & ANR., reported in 1972, (13) GLR 471, he has further argued that the learned Judge of the Revisional Court has correctly allowed the Criminal Revision Application No.68 of 1997 filed by the complainant and a legal order has been passed by him by giving suitable directions to the learned Magistrate of the trial Court and in view of this, this present

Criminal Revision Application be dismissed. In support of his submissions, he has placed reliance on a decision of Patel Hathibhai Dwarkadas [Supra], which is referred to by the learned Judge of the Revisional Court in para-10 of his judgment Ex.4, which is challenged in this present Criminal Revision Application.

9. It is well settled legal position that in criminal case, on the basis of a police complaint filed by the complainant, the Police Officer has to make a thorough investigation for which, he has to collect the documentary evidence from the witnesses and record the statements of the witnesses conversant with the facts of the case and after completion of that investigation, if he finds that the case is true then he has to file a charge-sheet against the accused. If he finds that the complaint is "false" then by submitting his report to the Magistrate, he has to request to grant "B" summary without prosecution. If he finds that the complaint is "maliciously false" then he has to request the Magistrate to grant "B" summary with the prosecution and if he finds that the complaint is neither true nor false, then he has to make a report to the Magistrate with a request to grant "C" summary. The necessary provisions with regard to such different types of summaries are made in para-40 of Criminal Manual issued by the High Court. That para-40 reads as follows.

"Summaries of Final Orders

40. The following rule 246 of the Bombay Police Manual, 1959, has been reproduced for the information and guidance of the Judges and Magistrates:

Summaries of final orders - (1) Each Magistrate shall, immediately after disposing of a cognizable case, forwarded through the Police Station from which the case came, to the Superintendent or Sub-Divisional Police Officer concerned, a summary of a final order in Form E. It should be sent in all cases, whether disposed of by trial or otherwise brought to an end by the death, lunacy or escape of the accused or in other way whatever. When a case has been tried by a Magistrate he will issue the summary. In cases tried by the Court of Session, the Committing Magistrate will forward the required summary after the disposal of that case by that court or by the High Court. When the result of a case is changed on appeal or revision, the Magistrate who sent the original summary will send a summary of the amendment of Form F.

(2) If an accused in a case dies after a charge sheet

has been sent up against him but before any evidence is recorded by the trying Magistrate, the Magistrate should be requested to issue an "A" summary.

(3) Summaries in cases not sent up for trial but disposed of on final reports should be issued by a Magistrate who is empowered to take cognizance of the offence on a Police report.

(4) To reports in cases in which investigation has been refused by the Police under section 157(1)(b), Code of Criminal Procedure, a Magistrate's reply is necessary. It is sufficient to enter in question 4 of the summary (Form E) that the case is "not investigated by the Police acting under section 157(1)(b), Code of Criminal Procedure, with magistrate's approval." The Magistrate should also include in his summary the value of property alleged to have been stolen in such cases, unless investigation was refused on the ground that the complaint was of a Civil nature.

(5) If the case is "true" it should be classed as "A". This applies even where an accused is tried and, in the absence of conclusive evidence, is acquitted. The classes "B" and "C" are reserved for cases in which it is found that no offence has been committed at all either by the accused or by any one else. In such cases, if the complaint is found to be "false and maliciously false", the case should be classed as "B". If the case is found to be "neither true nor false" or "false but not maliciously false", it should be classed as "C". If the case ends in a conviction for a non-cognizable offence, it should be classed as "non-cognizable". A case where Police report made under rule 203 reveals commission of only a non-cognizable offence may also be classed as "Non-cognizable".

(6) If the case has been compounded, Magistrates should make no attempt to characterize the complaint, but should simply record against entry No.3 of the summary (Form 3) that the case has been compounded.

Similarly, when an accused person dies, or becomes a lunatic or escapes, this fact should be mentioned against entry No.3 of the summary form.

(7) Magistrates should send direct to the officer-in-charge of the Police Station for record summaries of their final orders in the prescribed form in cases referred to the Police for enquiry under Sections 156 and 202, Code of Criminal Procedure.

(8) Section 6 of the Criminal Law Amendment Act, 1952 provides for the appointment of Special Judge for trying the following offences:

(a) An offence punishable under section 161, section 165, or 165-A of the Indian Penal Code or sub-section (2) of Section 5 of the Prevention of Corruption Act, 1947;

(b) Any conspiracy to commit or any attempt to commit or any abatement of any of the offences specified in clause (a); and

(c) Any other offence connected with any of the offences specified at (a) and (b) above with which the accused may, under the Criminal Procedure Code, be charged at the same trial.

Police Station Officers or the officers of the Anti Corruption Bureau, as the case may be, should make their investigation reports with regard to the above offences to the Special Judges, in the same way as they make their reports to Judicial Magistrates under section 173 of the Criminal Procedure Code, and obtain summaries, from the Special Judges after the cases are decided.

(9) In cases in which Government has ordered prosecution the further orders of the Government should invariably be obtained, if for lack of evidence etc., no prosecution can be launched and "C" summary has to be asked for.

Note 1. - It may, however, be noted that the provisions referred to above do not, in any way, affect the discretion of the Magistrates to take cognizance of offences under Section 190, Code of Criminal Procedure, or to take any action prescribed under Section 204 of the said Code.

Note 2. - Rule 246 of the Bombay Police Manual, 1959, Vol.III, regarding summaries of final orders has no application to the Courts of the Metropolitan Magistrates.

Note : - All the paragraphs of this chapter except paragraph 40 are applicable to the Courts of the Metropolitan Magistrates also."

10. As held in case of Patel Hathibhai Dwarkadas

[Supra], it is well settled that even on summary asking by the Police, whether A, B or C typed, the Magistrate is not bound to issue any summary and he may take cognizance of the offence under Section 190(1)(b) of the Cr.P.C. Herein this case, on receipt of report for "B" summary from the Investigating Officer, the learned Magistrate, first passed an order to issue a show cause notice against the complainant. The complainant appeared through his advocate. He submitted his written reply Ex.4 opposing the request of Investigating Officer to issue "B" summary. After considering the material on record and after hearing the learned advocate for the complainant and the learned APP representing the State of Gujarat in the trial Court, the learned Magistrate by passing a judicial order, thought it fit just proper and necessary to issue "B" summary. He did not find it necessary to take cognizance of an offence on the basis of the police papers, submitted in support of the report the of Investigating Officer. As discussed earlier, the "B" summary can be granted in the case in which the Investigating Officer finds that the complaint is false, meaning thereby the persons whose names are stated as accused in the complaint were innocent and whatever averments were made by the complainant in his complaint, were false qua accused. Considering the resultant effect of such judicial order granting "B" summary, certainly a right has been crystallized in favour of the accused because a competent court having jurisdiction, after hearing the complainant, came to a conclusion that the accused were "not-guilty" or so to say innocent in the case. On the basis of such conclusion arrived at by the learned Magistrate of the trial Court, possibly accused could have lodged a complaint against the complainant for their defamation i.e. for an offence punishable under Section 500 of I.P.C. If this is the position, then the accused were certainly necessary parties before the first Revisional Court. Admittedly, the complainant, who filed a first Criminal Revision Application challenging the order of the learned Magistrate of the trial Court, did not join the accused in his Criminal Revision Application. Had the learned Judge of the Revisional Court applied his mind, he could have joined the accused as necessary parties in Criminal Revision Application before him, despite the fact that the complainant did not join the accused as necessary parties. The accused were adversely affected by the judgment of the learned Judge of the Revisional Court because he allowed the Criminal Revision Application meaning thereby the order of the learned Magistrate of the trial Court was indirectly set aside. Whatever the right was accrued by the accused in order of the learned Magistrate, was set at naught by the

learned Judge of the trial Court without hearing the accused and, therefore, in my view, the learned Judge of the Revisional Court has grossly erred in rendering his judgment Ex.4, which is challenged in this present Criminal Revision Application, by not giving an opportunity of being heard to the accused. Mr.Unwala has rightly placed reliance on a case State Bank of India [Supra], wherein it is held that though the statute does not expressly require a notice to be issued, or a hearing to be given to the parties adversely affected, and though the statute is silent and does not expressly require to issue of any notice, there is in the eye of law a necessary implication that the parties adversely affected should be heard, before the Court makes an order. This legal position is settled on the principle of natural justice. When a judicial authority is going to pass any judicial order, which directly or indirectly affects adversely to anyone then that party, who is going to be affected adversely is a necessary party and he should be given an opportunity of being heard before passing the order. Mr.Unwala has rightly placed reliance on a case of Mayaben Arjunsinh Vasadia [Supra] wherein, it is held that the term "party" is not defined in the Code of Criminal Procedure and when it is used with reference to a proceeding in a Court, its primary meaning is a litigant. It would, therefore, mean a person who is a party to play in the proceeding. In the absence of anything to the contrary in the context, the primary meaning of the word "party" should be adopted as the person who is interested in the proceedings or that he is likely to be affected one way or the other in the final outcome of the proceedings. In view of the aforesaid clear legal position settled by this Court, the accused were necessary parties before the first Revisional Court because the complainant had challenged a judicial order passed by the learned Magistrate of the trial Court by which a right was accrued in favour of the accused and that right was to the effect that the accused were "not guilty" or so to say "innocent". By that order, the learned Magistrate of the trial Court, after hearing the complainant, came to a conclusion that the complaint was false, quo accused meaning thereby whatever allegations were made by the complainant in his F.I.R. were such that no offence appeared to have been committed by the accused. In view of this factual aspect, this Court is of the view that the accused were interested in the proceeding of Criminal Revision Application filed by the complainant and whatever order, which was going to be passed in the final out come of that proceeding, was likely to affect the accused, either one way or the other way. Admittedly, the learned Judge of the Revisional

Court did not ask the complainant to implead the accused as necessary parties in the Criminal Revision Application before him. If the complainant was not ready to join the accused as necessary parties in his Criminal Revision Application then by taking suo-motu decision, the learned Judge of the Revisional Court could have joined the accused as necessary parties. The learned Judge of the Revisional Court decided the Criminal Revision Application in favour of the complainant. The decision rendered by the learned Judge of the Revisional Court indirectly affected a right of the accused with regard to a declaration made by the competent court that the accused were "not-guilty" or innocent. Thus, the learned Judge of the Revisional Court has committed a clear breach of principles of natural justice.

11. I do not accept the submissions of Mr.K.H.Baxi, learned advocate for the revision opponent No.2 that the accused were not necessary parties before the first Revisional Court because whatever order, challenged by the complainant was an illegal order, in view of the fact that the learned Magistrate of the trial Court did not follow the legal position settled in the case of Patel Hathibhai Dwarkadas [Supra]. It may be noted that on making perusal of the order of the learned Magistrate of the trial Court, it is apparent that said decision was not brought to the notice of the learned Magistrate of the trial Court by the learned advocate, who appeared for and on behalf of the complainant before the trial Court. Had the learned advocate representing the complainant brought to the notice of this decision possibly, the learned Magistrate of the trial Court would have passed a different order. Merely because this decision is not followed by the learned Magistrate of the trial Court, it cannot be said that it is an illegal order. At this stage, it is required to be noted that the learned Magistrate of the trial Court was having jurisdiction to defer from the view of the complainant and after affording full opportunity of being heard to the complainant, he accepted the submissions of Investigating Officer and granted "B" summary and, therefore, I do not agree with the submissions of Mr.K.H.Baxi that an order was an illegal. Whatever precaution was required to be taken, was already taken by the learned Magistrate of the trial Court before passing an order below the report of the Investigating Officer. Under the circumstances, without going into merits of the case with regard to the order of the learned Magistrate of the trial Court, this Court is of the view that the order passed by the learned Magistrate of the trial Court was a judicial order and if the complainant was not satisfied with that order then he

was at liberty to move the first Revisional Court but at the same time, it was the right of the accused to be heard by the first Revisional Court. Under the circumstances, when it is an admitted fact that the learned Judge of the Revisional Court rendered a judgment by setting aside the order of the learned Magistrate of the trial Court without affording an opportunity of being heard, the judgment itself is illegal and it is required to be set aside.

12. For the foregoing reasons, this Criminal Revision Application deserves to be allowed. The judgment Ex.4 dated 05.09.1997 of the learned Additional Sessions Judge, Mehsana, Camp at Patan rendered in Criminal Revision Application No.68 of 1997 is quashed and set aside. That Criminal Revision Application No.68 of 1997 is ordered to be remanded to the first Revisional Court with a direction that the learned Judge, who will hear Criminal Revision Application No.68 of 1997, pursuant to this order, shall afford full opportunity of being heard to the accused either by asking complainant to join the accused as opponents or by taking a suo-motu decision to join accused as necessary parties in Criminal Revision Application No.68 of 1997. Looking to the facts and circumstances of the case, this Court further directs the learned Judge of the first Revisional Court to give opportunity of being heard to the Investigating Officer also. The learned Judge of the first Revisional Court is also directed to hear, decide and dispose of the Criminal Revision Application No.68 of 1997, subject to the aforesaid directions, in accordance with law without being influenced in any manner, by the observations of this Court in this judgement. Rule is made absolute. Interim relief granted earlier by this Court [Coram : S.D.Pandit,J.] dated 20.10.1997 is made absolute for further period upto the final decision which may be taken in Criminal Revision Application No.68 of 1997, which is remanded by this Court.

[H. H. MEHTA, J.]

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